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No. 07-582

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION ET AL.

v.

FOX TELEVISION STATIONS, INC. ET AL.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR *AMICUS CURIAE* ABC TELEVISION AFFILIATES ASSOCIATION SUPPORTING RESPONDENTS

Wade H. Hargrove
Counsel of Record
Mark J. Prak
David Kushner
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP
150 Fayetteville Street,
Suite 1600
Raleigh, N.C. 27601
(919) 839-0300

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BRIEF FOR *AMICUS CURIAE* ABC TELEVISION AFFILIATES ASSOCIATION

Interest of *Amicus Curiae*[1]

Amicus curiae ABC Television Affiliates Association ("ABC Affiliates Association") is a non-profit trade association whose members consist of approximately 170 local television broadcast stations throughout the country that are affiliated with the ABC Television Network. The ABC Affiliates Association actively participates before the Federal Communications Commission ("FCC" or "the Commission"), Congress, and the courts on matters affecting the television broadcast industry.

The ABC Affiliates Association has a strong interest in the outcome of this case because the FCC's broadcast indecency enforcement policy directly and substantially affects the exercise by its members of their First Amendment freedoms.[2] The ABC Affiliates

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to S. Ct. Rule 37.3. Pursuant to S. Ct. Rule 37.6, counsel for *amicus curiae* state that no counsel for any party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] One of the ABC Affiliates Association's member stations—KMBC-TV, Kansas City, Missouri—was among those stations cited by the FCC for broadcasting indecent material in the FCC's original order, based on the station's broadcast of several episodes of the ABC Television Network drama *NYPD Blue* in which a character used the term "bullshit." *See Complaints*

(continued...)

Association and its member stations have a particular interest in the resolution of this case in a manner that clarifies the Commission's authority, consistent with the First Amendment, to regulate the broadcast of "fleeting expletives."

Summary of the Argument

The United States Court of Appeals for the Second Circuit concluded that the *Omnibus Remand Order*, which implemented the FCC's new indecency enforcement policy allowing the proscription of the broadcast of a single, fleeting expletive, was arbitrary and capricious under the Administrative Procedure Act ("APA") because the Commission had failed to

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(...continued)
Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd 2664 (2006)("*Omnibus Order*"). The licensee of KMBC filed a petition for review of the *Omnibus Order*, and ABC, Inc., operator of the ABC Television Network, and the ABC Affiliates Association were granted intervenor status. After transfer and consolidation of various petitions in the United States Court of Appeals for the Second Circuit, the ABC Affiliates Association was a party in the case before the Second Circuit in which ABC, other broadcast networks, and several *amici* challenged the indecency determinations made in the *Omnibus Order*. On remand from the Second Circuit, the Commission reversed on procedural grounds the indecency determination against KMBC's broadcast of certain material contained in the *NYPD Blue* episodes, although the Commission reaffirmed the indecency determinations at issue here. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8,* 2005, 21 FCC Rcd 13299, (2006), ¶ 75 ("*Omnibus Remand Order*"). Although a party below, the ABC Affiliates Association has elected to participate in the instant matter as *amicus curiae*.

articulate a reasoned explanation for its shift in policy. (Pet. App. 25a-35a.) The Second Circuit was correct that the *Omnibus Remand Order*—and the new broadcast indecency enforcement policy that it reflects—is unlawful under the APA. However, that is true not only because the Commission failed to explain adequately its abrupt shift in policy, but also because the Commission's new enforcement policy is directly contrary to the APA: The Commission's new indecency enforcement policy is, on its face, both "not in accordance with law" and "contrary to constitutional right" because that policy is directly contrary to this Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Commission's new policy is, therefore, unlawful under the APA—regardless of any explanation for that particular policy offered by the Commission.

Accordingly, it is not necessary, as some parties have suggested, for the Court to revisit its decision in *Pacifica*, which narrowly affirmed the Commission's then-existing and far narrower indecency enforcement policy, or to revisit *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), which affirmed the statutory public trustee regulatory framework for the broadcast media.

Argument

THE COMMISSION'S BROADCAST INDECENCY ENFORCEMENT POLICY IS UNLAWFUL UNDER THE APA

I. The APA Requires That Agency Action Be "In Accordance with Law" and Not Contrary to Constitutional Right

The Second Circuit determined that the *Omnibus Remand Order* was arbitrary and capricious—and hence unlawful—under the APA because it implemented an abrupt, unannounced shift in the Commission's indecency enforcement regime without adequate explanation. Consequently, the Second Circuit concluded that the Commission's new "fleeting expletives" policy must be set aside unless the agency, on remand, could provide a reasoned explanation for the change. (Pet. App. 25a-35a, 45a-46a.) The parties dispute the adequacy of the Commission's explanation and the correctness of the Second Circuit's conclusion. *See, e.g.*, Brief for Petitioner at 20-26; Brief for Respondent Fox Television, Inc. at 18-42. However, this Court need not resolve the issue of whether the Commission adequately explained its new policy. Legal analysis under the APA does not necessarily end with a determination that an agency has or has not adequately *explained* a change in policy. In this case, no remand to the agency is necessary for the Court to conclude that the FCC's new fleeting expletives policy, regardless of its justification, is invalid under the APA.

The APA makes unlawful agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," as well as

agency action "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2). Agency action is "not in accordance with law" when it cannot be reconciled with settled precedent. *See, e.g.*, *CBS Corp. v. FCC*, No. 06-3575, --- F.3d --- (3d Cir. July 21, 2008) (slip op. at 64 n.25) (finding agency determination of employment status "contrary to settled law" in light of *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)); *Jilin Henghe Pharmaceutical Co. v. United States*, 342 F. Supp. 2d 1301, 1309 (Ct. Int. Trade 2004) ("An agency's action . . . is not in accordance with law if it conflicts with either a statute or a binding court decision."). The APA thus requires agency action to be in accordance, not only with settled constitutional principles and limitations, but also with court decisions construing and applying those principles and limitations.

Even assuming *arguendo* that the Commission is correct that it offered a "reasoned explanation" for its dramatic shift in enforcement policy regarding the broadcast of a fleeting expletive, its new policy, nevertheless, cannot withstand scrutiny under the APA for the independent reason that the Commission's policy change is both "contrary to constitutional right" and "not in accordance with law" because it cannot be reconciled with this Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

II. The Commission's Fleeting Expletives Enforcement Policy Is Unlawful Under the APA Because It Is Contrary to *Pacifica*

Pacifica's narrow holding—and its construction of

the limitations on broadcast indecency regulation mandated by the First Amendment—provides no support for an FCC finding that Fox broadcast indecent or profane material where the "indecent" material consisted of an isolated, unscripted expletive aired during the course of two different two-hour live awards shows.

In a portion of the opinion that commanded a majority of the Court, *Pacifica* noted that its "narrow[]" holding does not sanction the exercise of Commission regulatory authority over a single, fleeting expletive: The Court there expressly did not "decide[] that an occasional expletive in [an Elizabethan comedy] would justify any sanction . . . ." *Pacifica*, 438 U.S. at 750.

Any doubt about the narrowness of the regulatory authority endorsed by *Pacifica* is eliminated by the separate concurring opinion of Justice Powell, without which there would have been no majority. Writing separately to underscore that *Pacifica* should not be read to confer upon the Commission "an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from *momentary* exposure to it in their homes," *id.* at 759-60 (Powell, J., concurring in part and concurring in the judgment) (emphasis added), Justice Powell approved of FCC regulatory authority of only the narrowest scope:

> On its face, [the Commission's holding] does not prevent [the broadcaster] from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience, nor from broadcasting discussions of the

> contemporary use of language at any time of the day. The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the *isolated* use of a potentially offensive word in the course of a radio broadcast, as distinguished from the *verbal shock treatment* administered by respondent here.

Pacifica, 438 U.S. at 759-60, 760-61 (Powell, J., concurring in part and concurring in the judgment) (emphases added). Justice Powell's opinion, then, makes clear what *Pacifica* did not sanction: *Pacifica* allowed the Commission to regulate the "verbal shock treatment" administered by the Carlin monologue but did not sanction suppression of other categories of speech (including "isolated" offensive words) described by Justice Powell. Indeed, protection of indecent speech is the background rule against which *Pacifica* operated and in light of which the Court carved out an exceedingly narrow exception. *See, e.g.*, *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("[E]xpression which is indecent but not obscene is protected by the First Amendment . . . ."); *Carey v. Population Services, Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

That *Pacifica* demonstrates that the First Amendment does not tolerate a finding of indecency or profanity in this instance is further bolstered by Justice Brennan's opinion:

> Having insisted that it seeks to impose sanctions on radio communications only in the limited circumstances present here, I believe that the FCC is estopped from using either this decision or its own orders in this case, 56 F.C.C.2d 94 (1975) and 59 F.C.C.2d 892 (1976), as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the *relentless repetition, for longer than a brief interval*, of "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." 56 F.C.C.2d, at 98. *For surely broadcasters are not now on notice that the Commission desires to regulate any offensive broadcast other than the type of "verbal shock treatment" condemned here*, or even this "shock treatment" type of offensive broadcast during the late evening.

Pacifica, 438 U.S. at 772 n.7 (Brennan, J., dissenting) (emphases added). Indeed, Justice Brennan concluded that the Commission lacks *all* authority to regulate supposedly indecent (as opposed to obscene) material, because indecent speech is fully protected by the First Amendment. *See id.* at 771 (Brennan, J., dissenting) (noting that plurality and concurring opinions "do no more than permit the Commission to censor the afternoon broadcast of the 'sort of verbal shock treatment' . . . involved here" but otherwise seek to

"insure that the FCC's regulation of *protected speech* does not exceed these bounds" (emphasis added)).

It is impossible to equate the pre-recorded 12-minute Carlin monologue in *Pacifica*—a "verbal shock treatment" "repeated over and over," *id.* at 757 (Powell, J., concurring in part and concurring in the judgment)—with the momentary, fleeting, and isolated broadcast of even the "F-word" in the middle of a live two-hour television awards show broadcast in the evening. This Court's narrowly-circumscribed approval of the Commission's proscription of the Carlin monologue in *Pacifica* does not countenance the Commission's new policy with respect to an isolated, non-repeated expletive.

III. The Court Can Fully Resolve This Case Under the APA and *Pacifica*

The Court need go no further than *Pacifica* to determine that the Commission's new indecency enforcement policy cannot withstand scrutiny under the APA. *See Kremens v. Bartley*, 431 U.S. 119, 136 (1977) (stating that the "Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied" (internal quotation marks and citation omitted)); *Washington State Grange v. Washington State Republican Party*, --- U.S. ---, 128 S. Ct. 1184, 1191 (2008) (same); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985) (same; applying rule in First Amendment context). *Pacifica* makes plain that the FCC's authority to regulate indecency is circumscribed by the protections afforded by the Constitution, and *Pacifica* does not sanction the Commission's new policy

penalizing the broadcast of a momentary and unrepeated expletive. Those settled principles, without more, determine that the Commission's new fleeting expletives policy is "contrary to constitutional right," "not in accordance with law," and thus invalid under the APA. *Cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995) (stating that the Court will decide a case on the narrower ground of adjudication if there are constitutional questions involved); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 847 (1977) (declining to resolve question whether constitutionally protected liberty interest was implicated by state procedures governing removal of foster children from foster homes because the case could be resolved on "narrower ground[]" that preremoval procedures employed by state were constitutionally adequate).

This case may—and, indeed, should—be decided under the APA and *Pacifica.* Consequently, the Court need not revisit its rationale supporting the "special treatment" given the regulation of broadcast indecency, *see Pacifica*, 438 U.S. at 748-50; *see also id.* at 757-60 (Powell, J., concurring in part and concurring in the judgment), or revisit the Congressionally-mandated public trustee regulatory framework for broadcast media approved in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), as some parties, *see, e.g.*, Brief of Respondents NBC Universal, Inc. et al. at 31-38, have suggested. *See generally Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (stating that the "Court will not anticipate a question of constitutional law in advance of the necessity of deciding it" (internal quotation marks and citation omitted)).

While there has been, as some parties have observed, an increase in recent years in the number of broadcast stations and in audio and video distribution technologies, the laws of physics have not changed. It is still not possible for more than one entity to operate, without destructive interference, at the same time on a specific broadcast channel in the same local area. Moreover, the "uniquely pervasive" and "scarcity" issues now raised by these parties are not fairly included in the question presented to the Court for which certiorari has been granted. *See* S. Ct. Rule 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 534-38 (1992) (explaining prudential rule that Court will not consider an issue even related to or complementary to the question presented where the issue is not "fairly included in" or is not necessary in resolving the question presented to the Court). Consistent with its long-established prudential principles, the Court should not reach out to address constitutional issues that are not necessary to the resolution of this case.

Conclusion

For the foregoing reasons, the judgment of the court of appeals that the FCC's new broadcast indecency enforcement regime is invalid under the APA should be affirmed.

Respectfully submitted,

Wade H. Hargrove
Counsel of Record
Mark J. Prak
David Kushner
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP
150 Fayetteville Street,
Suite 1600
Raleigh, N.C. 27601
(919) 839-0300

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